FOR ARGUMENT

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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I.

THE INITIATION AND PURSUIT OF A CRIMINAL PROSECUTION BY A LAW ENFORCEMENT OFFICER WITHOUT PROBABLE CAUSE CONSTITUTE ARBITRARY GOVERNMENTAL CONDUCT WHICH VIOLATES THE DUE PROCESS CLAUSE.

Respondents recognize that our Nation has a tradition of conditioning a criminal prosecution upon probable cause. Brief of Respondents at 18; see also, Brief of the National League of Cities at 8. Respondents further recognize that a requirement of probable cause for a criminal prosecution "fairly balances the state's interests in fighting crime with the individual's interest in remaining free from the unjust accusation of a crime," Brief of Respondents at 19, and that such a requirement would impose no burden on the criminal justice process. Brief of Respondents at 19, n.6. Nevertheless, Respondents take the position that the Constitution would permit a law enforcement officer to file a criminal prosecution without such probable cause. Brief of Respondents at 11.

A.

THE PROBABLE CAUSE STANDARD FOR THE SUBSTANTIVE DUE PROCESS RIGHT.

One argument that Respondents advance for this position is that some officers who file criminal charges without probable cause maybe acting negligently and that merely negligent governmental conduct does not violate the Due Process Clause. Brief of Respondents at 22-25. This argument confuses the constitutional standard for conduct by a law enforcement officer with the standard for a judicial remedy for its violation. It aspires to

plausibility only because of the semantic circumstances that the probable cause standard, like the negligence standard, is often explained as a standard of reasonableness. *E.g., Brinegar v. United States*, 338 U.S. 160, 175 (1949). In the context of the probable cause standard, "reasonableness" implies a standard of "common sense," *Illinois v. Gates*, 462 U.S. 213, 230 (1983), but not with the same meaning as the reasonable person standard in negligence law. See *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). The probable cause standard is a legal standard, that is, a constitutional standard. "The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable." *Id.* at 643-644; see *Brinegar v. United States, Supra*, 338 U.S. at 175-176.

An officer who makes an arrest or search without probable cause has violated the constitutional standard whether the officer acts deliberately and maliciously or negligently.[1] Similarly, a prosecutor may violate the due

[1] For a variety of policy reasons, the standard for a remedy for a constitutional violation may differ in various ways from that for the violation itself. See Argument II. Nevertheless, the general rule is that the exclusionary rule applies even to good faith violations of the Fourth Amendment. "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987); see also *United States v. Leon*, 468 U.S. 897, 923-924 (1984); *Franks v. Delaware*, 438 U.S. 154, 165, 171 (1975) ("deliberately or reckless"). Of course, the Fourth Amendment standard itself requires no greater certainty than probable cause. See *Maryland v. Garrison*, 480 U.S. 79, 86-87 (1987); *Hill v. California*, 401 U.S. 797, 1110-1111 (1971).

The exception to that general rule is for good faith reliance on a search warrant or a statute. *Illinois v. Krull, supra; United States v. Leon, supra*. the good faith standard is a standard of objective reasonableness; "the standard does not turn on the subjective good faith of individual officers." *Illinois v. Krull, supra* at 355.

If the Court were ever to apply the good faith exception more broadly to the exclusionary rule for warrantless searches and seizures, it would have no impact on the issue in this case. The objective reasonableness standard already governs the damages remedy for violation of the substantive due process right in this case by operation of qualified immunity. See *United States v. Leon, supra*, 468 U.S. at 922 and n.23 (analogizing the objective reasonableness standard of *Leon* and *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982). Moreover, the exclusionary rule applied in Fourth Amendment situations has no application to the requirement of probable cause for a prosecution.

process duty to disclose material exculpatory evidence even if the prosecutor merely overlooked the evidence or its significance. *United States v. Agurs*, 427 U.S. 97 (1976). The same should be true for the probable cause standard for a prosecution.

In its essence, Respondents' argument is that because some officers who act without probable cause do so negligently rather than deliberately, there should be no constitutional violation in either event. Respondents rely on *Daniels v. Williams*, 474 U.S. 327 (1986). In *Daniels*, however, the alleged violation was not of the probable cause standard or any other legal standard with a definition independent of the state of mind of the official. Rather, *Daniels* involved a claim by a jail inmate for injuries he

suffered in a fall caused by a pillow allegedly left by a correctional officer on the jail stairs. In that context, the Court held that injury caused by no more than a lack of due care "would trivialize the centuries-old principle of due process of law." *Id.* at 332.

But, due process often establishes a traditional constitutional standard for the conduct of a law enforcement officer. In this case, that standard is probable cause. An officer violates that standard without any inquiry into the officer's mental state beyond the standard itself. See *United States v. Leon, supra,* 468 U.S. at 922 n.23; *Wilson v. Seiter,* 111 S. Ct. 2321, 2326 (1991); *Graham v. Connor,* 490 U.S. 386, 399 (1989).

Moreover, Respondents ask more of their argument than it could support even if it had some validity. Respondents use it to try to deny citizens protection against deliberate as well as negligent violations. Respondents argue that there should be no constitutional right to freedom from prosecution without probable cause at all. However, that some violations of such a right may be less egregious than others is no reason to deny the right altogether.

B.

THE RECORD IN THIS CASE ESTABLISHES A VIOLATION OF THE CONSTITUTIONAL RIGHT TO FREEDOM FROM PROSECUTION EXCEPT UPON PROBABLE CAUSE.

Respondents contend that Petitioner's complaint "simply alleges that Detective Oliver failed to discover that Ms. Moore was providing bad information." Brief of

Respondents at 26. Respondents urge that police officers need to rely on drug addict informers such as Moore, despite the circumstances known to Detective Oliver showing the "obvious unreliability," Brief of Respondents at 7, of Moore as an informer. On the contrary, the complaint alleges an egregious violation of the substantive due process requirement of probable cause for a criminal prosecution.

What was Detective Oliver's basis for believing that Petitioner sold Moore the baking powder, if indeed anybody did? Respondents suggest that Moore was the source of this information and Detective Oliver should not be faulted for his mere negligence in relying on it. On the contrary, it was Detective Oliver himself, not Moore, who identified Petitioner as the alleged seller. Pet. App. 43a. What basis did Detective Oliver have for that accusation? None.

Moore identified Petitioner's father as the seller. Detective Oliver determined that was not credible. He then accused Petitioner's brother, unilaterally altering the arrest warrant. Detective Oliver determined, however, that Petitioner's brother could not have been the seller either. Without any basis Detective Oliver guessed on his own that Petitioner must be the seller. He telephoned Moore in another state and suggested Petitioner's name to her. Moore apparently agreed long distance without any way to identify Petitioner other than by his name. What basis did Detective Oliver understand that Moore had for accepting his suggestion that Petitioner might be the seller? None.

Yet Detective Oliver proceeded to present the case to the prosecutor and to the preliminary hearing exactly as Respondents have argued it: that a police officer received a tip from a reliable informer and that he relied on it. He did not report that he had actually surmised on his own that Petitioner was the culprit and that the informer had only confirmed his conjecture without any apparent basis. He did not advise that he pursued his own conjecture despite petitioner's cooperation and credible denial of involvement. No citizen could feel secure living in this society if the Constitution permitted a police officer to proffer and pursue a criminal charge in such an arbitrary, haphazard and, therefore, oppressive fashion abusive of the governmental power to invoke the severe machinery of the criminal justice process.

II.

SECTION 1983 PROVIDES A REMEDY AGAINST A LAW ENFORCEMENT OFFICER WHO INITIATES AND PURSUES A CRIMINAL PROSECUTION WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN PROBABLE CAUSE.

A.

THE LIABILITY OF DETECTIVE OLIVER FOR INITIATING AND PURSUING THE PROSECUTION WITHOUT PROBABLE CAUSE.

Respondents concede that a law enforcement officer should be subject to liability under § 1983 if the officer initiates a criminal prosecution by submitting false information to a prosecutor or failing to apprise a prosecutor of relevant information. Brief of Respondents at 32-33.

They appear to argue that the officer should not be liable if the officer merely presents all of the relevant information to a prosecutor and the prosecutor makes the judgment whether that information warrants prosecution.

Petitioner agrees both that the officer should be liable only for his or her own conduct with regard to the prosecution and should enjoy only qualified immunity and not the extraordinary immunity of the prosecutor in the charging process. See *Buckley v. Fitzsimmons*, ___ U.S. ___ (1993). In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court held that an officer is not shielded from a damages action by applying to a judicial officer for a warrant if the officer failed to exercise reasonable professional judgment. Similarly, an officer should not be shielded from an action if, in submitting evidence to a prosecutor for the filing of an information, he failed to exercise reasonable professional judgment in the presentation or withholding of evidence. See *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (The officer should not benefit from the immunity of the prosecutors "whom they have defrauded"); cf. Restatement (Second) Torts § 653, Comment g (ALI, 1977).

Respondents err, however, in arguing that the complaint did not meet that standard. The complaint alleged that Detective Oliver attested to a criminal information charging that petitioner distributed a "look alike" substance to Moore, knowing that he did not have probable cause for that charge. Pet. App. 43a. The complaint further alleged that Detective Oliver had received no information identifying Petitioner as the person who

committed the offense. Pet. App. 43a. It alleged that without any basis he surmised that Petitioner had done it and obtained an informer's concurrence without any indication that she had any basis for such agreement. Pet. App. 43a.

Nothing in the record suggests that the prosecutor played any greater role than relying on Detective Oliver's representations and judgment. Under Illinois law, a law enforcement officer may swear out an information, although the information must also be signed by a prosecutor. 725 Ill.Code § 5-111-3(b). Respondents suggest that the prosecutor "could have asked Oliver questions" about his earlier accusations against Petitioner's father and brother. Brief of Respondents at 33. That point misapprehends the standard. Detective Oliver "cannot excuse his own default by pointing to the greater incompetence of the" prosecutor. *Malley v. Briggs, supra,* 475 U.S. at 346 n.9.[2]

B.

THE OBJECTIVE REASONABLENESS STANDARD FOR § 1983 LIABILITY.

Respondents argue that the standard for liability should require proof of malice or improper purpose. Brief of Respondents at 25. Such a requirement would be

[2] When Petitioner voluntarily reported to Detective Oliver upon learning about the information he was briefly arrested and released on bond. Although that arrest violated the Fourth and Fourteenth Amendments because it was made without probable cause, it was the prosecution more than the arrest that caused Petitioner serious injury.

extraordinary under § 1983 and would be unnecessary as the qualified immunity standard provides law enforcement officers adequate protection unless they are unquestionably incompetent or purposefully violate the law. See Brief of Petitioner at 36-37.

Respondents argue that "(t)he common law tort of malicious prosecution is triggered only when malice motivates the filing of charges without probable cause." Brief of Respondents at 24-25. Such a malice requirement, in the typical state court malicious prosecution action, however, can generally be inferred simply from a lack of probable cause. *Denton v. Allstate Ins. Co.,* 152 Ill.App.3d 578, 504 N.E.2d 756, 762 (1986); Prosser & Keaton, THE LAW OF TORTS § 119, p. 884 (1984).[3] Accordingly, the § 1983 qualified immunity standard of objective reasonableness where an action will lie only if no reasonably trained officer could have thought probable cause existed, *Hunter v. Bryant,* 112 S.Ct. 534, 536 (1991), may be more rigorous than the malice standard for malicious prosecution. See e.g. *Wyatt v. Cole,* 994 F.2d 1113, 1120 (5th Cir. 1993) ("*Harlow's* qualified immunity standard is far more demanding than the objective components of the common law probable cause inquiry . . . ")

Respondents speculate that every criminal accused who wins a dismissal, a *nolle prosequi,* or an acquittal will "ride the shuttle" to the federal courthouse "to sue police officers." Brief of Respondents at 25. That specter is

[3] Cf, Brief of the National League of Cities at 24 n.12: "Of course, where a police officer has actual knowledge that a witness has lied to him and nevertheless proceeds to refer charges, that officer can be said to have acted with malice."

based, however, on Respondents' exaggerated characterization of the § 1983 claim as based on "mere negligence in failing to ascertain the absence of probable cause." *Id.* If reassurance is necessary, it is available from the experience of the states who have long provided malicious prosecution actions that have not stirred up such imagined hyperbolic litigiousness.

Such reassurance is also available from the experience with § 1983 actions for false arrest and illegal search. *Hunter v. Bryant, supra; Anderson v. Creighton, supra.* State officers are qualifiedly immune from suit and § 1983 plaintiffs carry the burden of showing the officer's actions were "plainly incompetent" or "knowingly violat[ive]" of constitutional rights. *Malley v. Briggs, supra,* 475 U.S. at 341; *Davis v. Scherer,* 468 U.S. 183, 190-191 (1985); *Anderson v. Creighton, supra; Hunter v. Bryant, supra,* 112 S.Ct. at 536. Moreover, the Court has ensured that those entitled to the benefit of qualified immunity have the immunity determination made at the earliest stages of any litigation. *Harlow v. Fitzgerald, supra,* 457 U.S. at 816-818; *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Hunter v. Bryant, supra,* 112 S.Ct. at 536; *Siegert v. Gilley,* 111 S.Ct. 1189, 1193 (1991). Therefore, Respondents' speculation that criminal defendants who gain dismissal of their criminal charges before trial would inundate the federal courts with § 1983 actions is unrealistic.

C.

THE REMEDY FOR VIOLATIONS OF THE CONSTITUTIONAL RIGHT TO FREEDOM FROM PROSECUTION EXCEPT UPON PROBABLE CAUSE.

Respondents argue: "Never before has the Court expanded the boundaries of substantive due process for

the sole purpose of accommodating a § 1983 damages action on behalf of an aggrieved individual." Brief of Respondents at 17. Substantive due process rights are established, however, to provide constitutional protection for them in our society. A § 1983 action is one way of enforcing such rights if officials fail to honor them. Often such an action is the only effective remedy. E.g., *Youngberg v. Romero,* 457 U.S. 307 (1982) (substantive due process protects mentally retarded persons involuntarily committed to a state institution and a § 1983 damages remedy is available to enforce the protection); Cf. *Helling v. McKinney,* ___ U.S. ___, 61 L.W. 4649, 4650 (1993); *Hudson v. McMillian* 503 U.S. 1 (1992); *Graham v. Connor,* 490 U.S. 386 (1989); *Tennessee v. Garner,* 471 U.S. 1 (1985); *Estelle v. Gamble,* 429 U.S. 97 (1976).

Respondents further argue that if the right to freedom from criminal prosecution except upon probable cause "was truly worthy of constitutional recognition, then *a fortiori,* it would be deserving of a procedural safeguard." Brief of Respondents at 21. In respect to its procedural safeguards, however, this substantive due process right is analogous to others, such as the due process duty of a prosecutor to disclose material exculpatory evidence to a defendant. *Brady v. Maryland,* 373 U.S. 83 (1963). The due process duty of disclosure is left to the prosecutor in the first instance, without judicial review before conviction. See *United States v. Bagley,* 473 U.S. 667 (1985); *United States v. Agurs,* 427 U.S. 97 (1976). The Court's decisions instruct prosecutors in their constitutional duty but the initial enforcement of the duty is the responsibility of the prosecutors themselves. Similarly, the Court, by its decisions, instructs law enforcement

officers in the probable cause standard for criminal prosecutions and leaves the initial enforcement of the standard to them, subject to judicial review only later.

Indeed, Respondents' point works against their position opposing a remedy under 42 U.S.C. § 1983 for a violation of the right. A § 1983 remedy is designed to deter as well as to remedy any constitutional violation. *Malley v. Briggs, supra,* 475 U.S. at 344. Without such a remedy, it may truly be said the constitutional command is advisory only. Dismissal or termination of the criminal prosecution mitigates the harm from the violation but does not provide a remedy for it. "A 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' " *Gomez v. Toledo,* 446 U.S. 635, 639 (1980); see also *Anderson v. Creighton, supra,* 483 U.S. at 638; *Malley v. Briggs, supra,* 475 U.S. at 344. Policy reasons – such as avoiding delay – may counsel against constitutionally required judicial review of grand jury indictments[4] or prosecutor informations before trial. *Costello v. United States,* 350 U.S. 359, 361 (1956). But, they only make more important the availability of the § 1983 remedy.

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[4] In *United States v. Williams,* ___ U.S. ___, 112 S.Ct. 1735 (1992), the Court held that the federal courts have no supervisory judicial authority over grand juries and, therefore, no power to require prosecutors to present exculpatory evidence to the grand jury.

III.

THE ISSUES RAISED BY THE RESPONDENTS OF QUALIFIED IMMUNITY, STATUTE OF LIMITATIONS, AND MUNICIPAL CUSTOM OR POLICY WERE NOT PASSED UPON BY THE COURT OF APPEALS AND, ACCORDINGLY, MAY BE LEFT TO THE COURT OF APPEALS ON REMAND.

A.

QUALIFIED IMMUNITY

Respondents argue that Detective Oliver is entitled to the benefit of qualified immunity in this case because "the law has not yet recognized a clearly established constitutional right to be prosecuted only upon an objectively reasonable belief in the presence of probable cause." Brief of Respondents at 37. That argument overlooks the long constitutional tradition demonstrating the centrality of probable cause to the initiation of criminal process.

Qualified immunity is "assessed in light of the legal rules that were 'clearly established' at the time." *Anderson v. Creighton,* 483 U.S. 635, 637 (1987). The Court has made clear that this does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 640. Instead, it is only necessary "that in the light of pre-existing law the unlawfulness must be apparent." *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*; see generally, *Norfleet v. Arkansas Dept. of Human Resources,* 989 F.2d 289, 291 (8th Cir. 1993); *Tribble v. Gardner,* 860 F.2d 321, 324, cert. den.,

490 U.S. 1075 (1988); *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

In a distinguished line of early and recent decisions this Court has long assumed that the requirement of probable cause for a prosecution is a part of due process. See Brief of Petitioner at 13-17. The courts of appeals have generally held or assumed that the Due Process Clause requires probable cause for a prosecution. See Brief for Petitioner at 14-15, n.7. The court below did not dispute this proposition, but based its decision only on whether a § 1983 action would lie for violation of the due process requirement.[5] Respondents are unable to cite a single authority holding or suggesting that due process does not require probable cause for a prosecution. Respondents concede that the Constitution does require probable cause for a prosecution if the accused is arrested or detained and recognize that as a practical matter that "compels the states to apply a standard of probable cause to the filing of all felony charges . . . [because] the state does not know in advance which criminal defendants will make bail, and which will not." Brief of Respondents at 19. It would be extraordinary to hold that an officer, acting within this constitutional system as conceived and by long tradition as practiced, could ever have reasonably believed probable cause was not required to support bringing a criminal

[5] Respondents appear to confuse this point when they argue that "Justice White has specifically noted that there is 'clear disagreement among the Courts of Appeals' on whether malicious prosecution gives rise to a cause of action under § 1983." Brief of Respondents at 37. The question is whether the constitutional right is well established, not whether the § 1983 action is well established. *Anderson v. Creighton, supra.*

prosecution. Respondents do not identify any source that would give Detective Oliver any basis for believing that the Constitution did not require him to have probable cause before initiating a criminal prosecution against Petitioner.

But, this Court need not reach this question. The court below did not discuss it. Accordingly, the Court may remand the case for the Court of Appeals to pass on this issue in the first instance.

B.

STATUTE OF LIMITATIONS

The courts of appeals have consistently held that one element of a claim under § 1983 for a prosecution without probable cause is that the underlying prosecution terminate in favor of the plaintiff. *Brummett v. Camble*, 946 F.2d 1178, 1183-1184 (5th Cir. 1991); *Robinson v. Maruffi*, 895 F.2d 649, 654-655 (10th Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 348-349 (3d Cir. 1989); *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980).[6] Such a rule is required by the common law for malicious prosecution actions, Restatement (Second) Torts 658 (1977), is grounded in sound policy, and may also be required by abstention

[6] Respondents cite two cases in which civil rights plaintiffs were permitted to sue under § 1983 for the presentation of false evidence to procure their convictions, *King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990) and *Smith v. Springer*, 859 F.2d 31, 33-35 (7th Cir. 1988). Those claims were not based on the substantive due process right to be free from a criminal prosecution except upon probable cause but on a different due process right.

theory under *Younger v. Harris*, 401 U.S. 37 (1971) or principles of *res judicata*.

Petitioner was not free of the harm resulting from his prosecution until it terminated in his favor. He could not have filed this action until the prosecution against him was dismissed. *Brummett v. Camble, supra*, 946 F.2d at 1183-1184.

This is another issue that the Court need not reach. The Court below did not discuss it. Accordingly, the Court may remand the case for the Court of Appeals to pass on this issue in the first instance.

C.

MUNICIPAL CUSTOM OR POLICY

This is an issue the Court need not reach. It was not within the question on which the Court granted certiorari, Rule 24.1(a), Supreme Court Rules. The court below did not discuss it. Accordingly, the Court may remand the case for the court of appeals to pass on in the first instance, see *Leatherman v. Tarrant County*, ___ U.S. ___, 61 L.W. 4205 (1993).

IV.

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's opening brief, the judgment affirming the dismissal of the complaint for failure to state a § 1983 claim should be reversed, and the case should be remanded for further proceedings on the § 1983 claim.

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